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Cases:

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United States v. *Calderon*, 348 U. S. 160 9
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Statute:

Internal Revenue Code of 1939, Sec. 145 (26 U. S. C. 1952 ed., Sec. 145) 2

356502—55

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 272

GEORGE W. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. i–vii) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1955 (Pet. App. vii). The petition for a writ of certiorari was filed on July 28, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for wilful attempted income tax evasion, the evidence was

sufficient to establish the starting point for the Government's expenditures computation of petitioner's unreported taxable income.

2. Whether the evidence was sufficient to establish a possible current taxable source for petitioner's expenditures in excess of reported taxable income.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure To Collect and Pay Over Tax, or Attempt To Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> * * * * *
>
> (26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

On January 13, 1954, a three-count indictment was returned against petitioner in the United

States District Court for the Northern District of California, Southern Division, charging him with having willfully attempted to evade and defeat his and his wife's income taxes for 1947 and 1948 [1] (R. 3–6). The indictment alleged the following deficiencies:

Year	Reported		Corrected	
	Income	Tax	Income	Tax
1947 (Husband)	$9,483.25	$2,018.10	$197,300.47	$143,761.90
1947 (Wife)	11,543.09	2,884.55	197,300.47	146,189.40
1948 (Joint)	115,153.06	53,113.62	308,099.51	199,834.82

After a jury trial lasting approximately nine days, petitioner was found guilty as charged (R. 16). On June 8, 1954, he was sentenced to one year in prison plus a fine of $24,000 (R. 18–19). The Court of Appeals affirmed the conviction (Pet. App. i–vii).

The evidence to support the verdict may be summarized as follows:

In 1904, at the age of fourteen, petitioner began an association with organized horse racing that was to continue, in various capacities, throughout his adult life (R. 612–613). Although his formal education extended only through the eighth grade, his adeptness at mathematics led him to become not only a bookmaker but an official odds-maker at several race tracks (R. 612–614, 623, 637–638). He

[1] For 1947 petitioner and his wife filed separate returns with reported income computed on a community property basis. For 1948 they filed a joint return.

testified that in 1932 he ceased functioning as a professional bookmaker but admitted that he thereafter continued personal wagering on horse races, both at and away from the race tracks (R. 756, 799–800).

From 1924 through 1948 he used a combination cigar store-social club as his office and mailing address (R. 76, 266–267, 372–373, 454–455, 711, 753, 803, 896). The Government introduced evidence that there were horse bets made on these premises and that the premises were owned by petitioner in 1947 (R. 361, 374–375). Admittedly he had access to the safe located there (R. 709, 804). One Government witness testified to having observed petitioner instruct a third party to place a $15,000 horse bet for him in late 1947 or early 1948 and another testified to a conversation with petitioner during 1947 or 1948, wherein the latter remarked that he had lost $125,000 betting on a particular horse running at Tanforan (R. 358–360, 370–371). Petitioner denied the magnitude of this wager, stating that he had only made a "small bet" of $1,000 on the race (R. 703–704). He reported no gambling income on his returns for 1947 and 1948 (R. 227–233).

In 1947 and 1948 petitioner was employed by the Detroit Racing Association. In 1947 he acted as the track's paid "advisor" and in 1948 was its president and general manager (R. 651, 688). According to a deposition by the secretary of the association petitioner received a $100,000 salary

plus a bonus of about $100,000 during 1948 (R. 640, 652, 893). In contrast petitioner reported only $100,676.40 salary on his 1948 return as income from that source (R. 229–230). Petitioner's 1948 return also failed to reflect $43,198.44, his pro rata share of partnership income for that year from the Laurel Pottery Manufacturing Company (R. 238–239).

Petitioner kept no adequate records of his income (R. 460–462, 748). The Government, therefore, computed his taxable income for the years from 1942 to 1948, inclusive, by showing his expenditures during each of those years, the funds available from his declared resources for the making of such expenditures, and the annual excess of expenditures over available resources (R. 464–465). This computation established the following amounts of unreported income (R. 467-500; Exs. 61, 62, 63):

1942	$9,411.94
1943	1,668.59
1944	21,632.69
1945	39,973.52
1946	158,582.54
1947	469,779.35
1948	193,063.69

Petitioner conceded the accuracy of the Government's figures as to his expenditures (R. 859–861), but he claimed that he had more funds available than the Government had allowed. His explanation was that he had accumulated $1,000,000 in currency by 1930 which he thereafter carried with him in suitcases (R. 631, 654, 861)—

an explanation which was rendered highly implausible by his admission at the trial that he still retained the largest part of this currency at the end of 1947 (R. 771–774). Furthermore, although petitioner insisted that he had reported large amounts of income between 1920 and 1928 (R. 733–750), he had no records of these returns (R. 620–630, 731–754) and the Government's records revealed no George W. Lewis who had paid more than nominal amounts from 1920 through 1935 (R. 918–926).

There was cogent evidence to support the Government's contention that petitioner had only about $10,000 available at the end of December 1941, the starting point of the Government's expenditures computation (R. 469–470). During 1940 and 1941 petitioner submitted several offers in compromise of approximately $4,400 taxes owed by a corporation whose assets had been transferred to him. On March 25, 1940, he offered $500 and stated that his own net worth was "nil." On January 15, 1941, he offered $1,000, and on April 15, 1941, he again raised the offer to $1,500, to be paid in installments, and explained that he was unable to pay more. A final offer of $1,500, with more prompt terms of payment, was made in the following October and ultimately accepted by the Government in December. (R. 58–77.) In November petitioner filed a sworn statement of his financial condition with a Collector

of Internal Revenue in which he listed his only assets as $5,100 in cash and an automobile worth $1,300. He stated that his gross income for the last three calendar years had been $4,600, $5,100 and $9,700 respectively (R. 342–349, 820–829).

ARGUMENT

1. In view of the evidence set forth above there is clearly no merit to petitioner's contention (Pet. 15–16) that the Government failed to establish an adequate starting point for its computation of his resources at the beginning of the indictment years. In this case the Government used a variation of the net worth method in which attention is directed to the excess of the taxpayer's expenditures over his available declared assets during any given year, rather than to increases in annual net worth in excess of reported taxable income.[2] It was shown, by petitioner's own sworn statement of November 1941 and by the several offers in compromise of the corporation's tax liability, that he could not have had assets significantly in excess of $10,000 at the beginning of 1942. The Government then showed his expenditures and his traceable receipts in each of the years from 1942 to 1946, inclusive (R. 468–480). In most of these years expenditures far exceeded receipts, and

[2] This type of computation of unreported income was used in *United States* v. *Johnson*, 319 U. S. 503, 517, and this Court has noted the fact that it is simply a variation of the net worth method. *Holland* v. *United States*, 348 U. S. 121, 124.

CONCLUSION

The judgment of the court below is correct and presents no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

H. BRIAN HOLLAND,
Assistant Attorney General.

JOSEPH M. HOWARD,
GEORGE WILLI,
Attorneys.

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Ernst